88-1209 (3)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES W. and NELLIE P. BAUER,
Petitioners,

vs.

ROBERT H. WALDSCHMIDT, as Trustee of the Bankruptcy Estate of CHARLES W. and NELLIE P. BAUER, SOVRAN BANK/CENTRAL SOUTH (formerly known as Commerce Union Bank of Clarksville, Tennessee), KENNETH C. BAINES, and MICHAEL BIGGS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Whether an order substituting a trustee in bankruptcy as the plaintiff in a District Court action, wherein the debtor in bankruptcy was the original plaintiff, is appealable under the collateral order exception to the final judgment rule.

2. Whether 28 U.S.C. § 1411 grants to debtors in bankruptcy proceedings standing to pursue prepetition claims which are assets of their bankruptcy estate.

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Robert H. Waldschmidt, as trustee for the bankruptcy estate of Charles W. and Nellie P. Bauer, hereby objects to the petition of Charles W. and Nellie P. Bauer for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case relative to the substitution of the trustee as the plaintiff in a personal injury action in the United States District Court for the Middle District of Tennessee.

OPINIONS BELOW

Respondent would incorporate by reference the statement relative to opinions below cited in the petition for writ of certiorari.

JURISDICTION

Respondent would incorporate by reference the statement relative to jurisdiction cited in the petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Respondent would incorporate by reference the statement relative to statutory provisions involved cited in the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondent would incorporate by reference the statement of the case cited in the petition for writ of certiorari, except for the following facts which should be added for clarification:

1. The petitioner's ability to recover any damages from Sovran Bank in the District Court action is highly contingent; the claim has not been adjudicated, and the value of the claim is disputed by the parties.

2. The trustee in bankruptcy did not, and could not, authorize counsel for the petitioners to proceed with the District Court action on behalf of the bankruptcy estate. At the time of the correspondence (set forth in the appendix of the petitioner, A-39-41), the bankruptcy case had been closed, and the trustee had been discharged from further duties. The trustee was not vested with any authority to make any decisions on behalf of the estate at the time of that correspondence.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari should be denied because the opinion of the United States Court of Appeals for the Sixth Circuit is consistent with public policy, statutory construction, and decisions by other courts which have rendered decisions interpreting 28 U.S.C. § 1411.

The Court of Appeals held that the order substituting the trustee as plaintiff did not meet the collateral order exception to the final judgment rule. However, in finding that the District Court decision did not involve an "important" issue, as required under the doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the court had to analyze the petitioner's argument involving a right to trial by jury under 11 U.S.C. § 1411. The Court of Appeals correctly applied the principles of that case in finding that the appeal did not involve an "important" issue.

The petitioners have asserted that the decision of the Court of Appeals conflicts with a Bankruptcy Court decision out of the Southern District of New York. *In re McCorhill Publishing, Inc.*, 89 B.R. 393 (Bankr. S.D. N.Y. 1988). The petitioners allege that this case creates a conflict between Circuits, thereby justifying the grant of certiorari in this case. This position is unfounded.

First, the *McCorhill* decision was rendered by a Bankruptcy Court, and not the Second Circuit Court of Appeals; the Second Circuit cannot be deemed to take an inconsistent position merely by the holding of a Bankruptcy Court in one district of the circuit. Furthermore, the *McCorhill* case did not involve a conflict between the trustee and the debtor. In that case, the trustee supported the debtor's joinder in the proceeding, and the joint effort between the trustee and the debtor did not impose any restriction on the administration of the bankruptcy estate. In the instant case, the trustee's intentions with respect to the District Court action differ from the desires of the deb-

tors. The trustee has sought to compromise and settle the claim against Sovran Bank, and the debtors have objected to the trustee's proposed settlement. Therefore, the debtors' participation in the District Court litigation would merely serve to frustrate and restrict the efforts of the trustee to administer an asset of the bankruptcy estate, unlike the situation in the *McCorhill* case. Thus, there is no split between the Circuit Courts of Appeal.

The petitioners have also asserted that the substitution of the trustee as plaintiff denies them the right to a trial by jury under 28 U.S.C. § 1411, and thus, an important question of federal law has been decided. The trustee asserts that this position is without merit.

Under the provisions of 11 U.S.C. § 541, the personal injury action of the Bauers became part of the bankruptcy estate upon the filing of their voluntary petition under Chapter 7. *Management Investors v. U.M.W.*, 610 F.2d 384 (6th Cir. 1979); *Scharmer v. Carrolton Mfg. Co.*, 525 F.2d 95 (6th Cir. 1975); *Tignor v. Parkinson*, 729 F.2d 977 (4th Cir. 1984). Under the Bankruptcy Code, debtors do not have any authority to administer assets of an estate in a Chapter 7 proceeding. The Chapter 7 trustee is given the responsibility of administering all assets of the estate under 11 U.S.C. § 704. Therefore, the Bauers do not have standing to pursue the District Court action, and substituting the trustee as plaintiff was appropriate.

The Bauers have asserted that substituting the trustee as plaintiff destroys the right to trial by jury established in 28 U.S.C. § 1411. However, the District Court's order does not eliminate the right to trial by jury; the trustee is vested with that right if he chooses to litigate the matter. Hence, the right to a jury trial under 28 U.S.C. § 1411 is preserved for the benefit of the bankruptcy estate.

The petitioners assert that they will forfeit the right to trial by jury because the trustee intends to compromise this litigation.

However, the election of the trustee to litigate or compromise the cause of action does not constitute a loss of the right to a trial by jury under 28 U.S.C. § 1411. The only right which has been forfeited by the Bauers is their ability to control the administration of their bankruptcy estate, which includes the District Court action.

It has also been asserted that the Bauers have a direct interest in this District Court proceeding. The trustee agrees that the debtors have an interest in any surplus funds generated in the bankruptcy proceeding, but that does not create standing in the District Court action. The Bauers' rights are limited to contesting any proposed compromise in the Bankruptcy Court. Thus, although the Bauers may have a concern about the resolution of the District Court action, their interest is limited to a claim against any surplus funds of the bankruptcy estate, after payment has been made to their creditors.

The petitioners had the opportunity to control their own destiny. When the bankruptcy petition was originally filed, they elected to proceed under Chapter 7, receive a discharge, and permit their assets to be administered pursuant to the provisions of Title 11 of the United States Code. They could have chosen to file under Chapter 11 or 13, thereby preserving their ability to control this litigation. That voluntary decision by the debtors permits this action to be administered by the Chapter 7 trustee, and their attempt to regain control over the District Court action is unsupported under legal or equitable grounds.

Therefore, the debtors do not have standing to pursue the District Court Action, and a substitution of the trustee as plaintiff in the District Court action does not create any conflict between Circuits, or violate any rights under 28 U.S.C. § 1411.

CONCLUSION

The decision of the Court of Appeals does not conflict with any other Circuit Court decision, does not depart from the accepted and usual course of judicial proceedings, and does not involve any important federal question. Pursuant to Rule 17 of the Supreme Court Rules, there is no basis for the grant of a writ of certiorari and hence, the petition of Charles & Nellie Bauer should be denied.

Respectfully submitted,

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